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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON, and JOSEPH O. TOBIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

October Term, 1944

No.

Ernest H. Denicke,

Petitioner,

vs.

R. D. Brigham, Walter E. Buck, R. Stanley Dollar, Herbert Fleishhacker, Mortimer Fleishhacker, Mortimer Fleishhacker, Jr., Walter A. Haas, William F. Humphrey, Samuel Kahn, J. C. McKinstry, Joseph Haber, Jr., William B. Reis, Leon Sloss, Jr., Alfred B. Swinerton, and Joseph O. Tobin,

Respondents.

PETITION FOR WRIT OF CERTIORARI
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for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

This is an application under Section 240 of the Judicial Code (28 USCA 347) for a review, on certiorari, of the following matter, viz.:

Case No. 10,347 (CCA 9th Cir.) entitled "Ernest H. Denicke, Appellant, vs. R. D. Brigham, et al., Appellees".

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This appeal concerns a consolidation of Anglo California Trust Co. (a State Bank) with The Anglo & London Paris National Bank of San Francisco. Petitioner held shares in the State Bank. He sustained a forfeiture of redemption rights. This resulted from:

1. Violations of the Federal Act under which merger was accomplished (12 USCA 34a).

2. Conduct of the National Bank in publishing a false condition statement in violation of 12 USCA 161.

Both sections were part of the National Bank Act. Directors were liable for violations thereof under 12 USCA 93,—also a provision of that Act. Such section provides:

". . . in cases of such violations (of National Bank Act) *every director who participated in or assented to the same* shall be held *liable in his personal and individual capacity* for *all damages* which the associa-

tion, its shareholders, or *any other person,* shall have sustained in consequence of such violation."

Petitioner is a party affected. He joined directors to enforce their liability under Federal Law. The cause of action was Federal. See,

Chesbrough v. Woodworth, 244 US 72;
Jones National Bank v. Yates, 240 US 541.

The jurisdictional facts were ignored in the District Court. Dismissal was ordered. The Circuit Court filed an opinion in which jurisdictional facts were suppressed. It refused to recognize or follow opinions of this Court. Its "decision" exhibits a total disregard of precedent.

Other Matter Pending.

There are two proceedings involving this merger, viz.: the case at bar, and a companion suit brought by Mary E. Doble, a shareholder of The Anglo & London Paris National Bank. See "Doble v. Buck et al.[1] (CCA 9th Cir. No. 10,348)" docketed herewith. It will aid the Court if the papers therein are given first consideration.

There are some questions in common. Both matters were briefed and argued together in the Circuit Court.[2]

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[1]The following persons are parties defendant in both cases: Herbert Fleishhacker, Mortimer Fleishhacker, Walter E. Buck, R. Stanley Dollar, Walter A. Haas, William F. Humphrey, J. C. McKinstry, Alfred B. Swinerton and Joseph O. Tobin.

[2]An order in the Circuit Court permitted the filing of consolidated opening and closing briefs. (R. 113; Buck R. 91.) Both matters were argued and submitted together on February 15, 1944 (R. 114, Buck R. 92). Circuit Judges Mathews, Stephens and Healy were assigned therein,—the same Court which acted in case No. 155 October Term 1944, entitled "Ernest H. Denicke and Mary E. Doble v. Anglo California National Bank of San Francisco, et al."

For convenience we refer to this other suit as the "*Buck Case*". The record therein is cited at "Buck R. ....."

Questions in Common.

A State Bank was merged with a National Bank by a contract providing for a compulsory exchange of outstanding shares. Stockholders received a false letter from the president. This represented that an exchange constituted their only remedy. With that letter they received a form to use in surrendering certificates. This was drawn to obtain a waiver of rights in advance. There was a legal notice of meeting. This stated that the contract was on file at the bank—that shareholders might examine it on request. That agreement was so drawn as to conceal everything except the obligation to exchange certificates when two thirds of the stock voted for the plan.

Such documents infringed and prevented free exercise of the limited right of redemption provided by 12 USCA 34a. Stockholders of both banks received substantially the same literature. See appendix page 19.

The violations of Federal Law involved therein are discussed in detail in the petition filed in the *Buck Case*. In the interest of brevity we adopt that presentation herein.

Grounds Sustaining Federal Jurisdiction.

1. Suit arose under Federal Law because brought to enforce liability created by Act of Congress. So held in,

Chesbrough v. Woodworth, 244 US 72;
Wyman v. Wallace, 201 US 230;
Jones National Bank v. Yates, 240 US 541.

2. Suit arose under the laws of the United States because the violation of a duty created by Federal Law was an essential ingredient of the cause of action. So held in,

Texas & Pacific Ry. Co. v. Rigsby, 241 US 33;

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548;

Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501.

3. There was a Federal question because a correct decision of case depended on construction and interpretation of Federal Laws. So held in,

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 378;

California Bank v. Kennedy, 167 US 362.

4. Where jurisdiction attaches because of Federal Questions, the Court has power to dispose of the entire controversy. So held in,

Siler v. Louisville & Nashville RR Co., 213 US 175;

The Fair v. Kohler Die Co., 228 US 22;

Chicago Life Ins. Co. v. Needles, 113 US 574.

Third Count.

Publication of False Balance Sheet in Violation of 12 USCA 161.

Before the merger petitioner Denicke held shares in The Anglo California Trust Company. The assets of that bank were put into a national association—The Anglo & London Paris National Bank of San Francisco. A new institution resulted, viz.: The Anglo California National Bank of San Francisco. It became the owner of a consolidated mass of property contributed by both banks.

The value of that mass depended on the conditions in the predecessor banks. The equity acquired by a share-

holder in the new bank depended on the same fact. Denicke was damaged by frauds involving the bank into which his stock was merged. He alleged that just before such merger the Anglo London Paris Bank,

> ". . . published and displayed to the general public a false and fraudulent statement of its condition, in violation of 12 U.S. Code, Secs. 161 and 324 . . . said bank falsely, fraudulently and unlawfully represented to the public, including plaintiff, that the net amount of its unimpaired capital . . . was a sum in excess of the true value thereof to the extent of $6,500,000. The report of its condition . . . concealed this amount of shrinkage . . ." (R. 28, Par. XX.)

Personal loans of respondents were involved in that shrinkage.

> ". . . Herbert Fleishhacker maintained an overdraft in his commercial account . . . which overdraft exceeded the sum of $600,000,—which said defendant was wholly unable to satisfy except by resort to the technical expedient of borrowing from such bank . . ." (R. 28, Par. XX.)

> ". . . R. Stanley Dollar . . . direct obligations aggregating $1,173,062.19 . . . indirect obligations of $502,745.95 all . . . substandard and under criticism by the national banking examiners . . ." (R. 29.)

> ". . . Wm. F. Humphrey . . . direct obligations totaling $263,500 . . . indirect indebtedness . . . $723,500, all of which was classified as slow by said national bank examiners . . . Defendant Humphrey had not been out of debt to Anglo London Bank for . . . ten years prior to the date referred to . . ." (R. 29-30.)

> "J. C. McKinstry . . . $90,000, . . . classified as slow and doubtful." (R. 30.)

"Alfred B. Swinerton . . . direct indebtedness . . . $50,000 . . . indirect . . . $3,775, all . . . classified as slow." (R. 30.)

"Joseph O. Tobin . . . direct . . . $100,000, . . . slow." (R. 30.)

An amount equal to the entire capital stock of the national bank was being used to carry directors' loans,

"A total of between 100% and 150% of the capital stock of said bank was outstanding in the shape of loans to officers and directors corporations throughout said time." (R. 30-31.)

Mortimer and Herbert Fleishhacker were involved in some of that credit pyramid. Their credit structure was classifiled by the examiners as follows:

"Wholly Owned Partnership Enterprises	$ 3,025,654.77
Corporations in which Mortimer and Herbert Fleishhacker were substantially interested	1,184,000.00
Liabilities of Herbert Fleishhacker	4,377,095.25
Corporations in which Herbert Fleishhacker was substantially interested	1,644,708.33
Corporations in which Herbert and/or Mortimer Fleishhacker held between 10% and 25% interests	2,140,662.91
Grand total	$12,372,121.26"

(R. 29.)

The merger was negotiated to conceal this shrinkage and relieve the parties affected from the burden of putting their accounts in shape,

> "The conspiracy . . . was engineered by each of the defendants . . . for the purpose of relieving the officers and directors of Anglo London Bank . . . from the obligation of repaying same . . ." (R. 31.)

The false balance sheet entered into the conspiracy,

> ". . . as an essential part of said conspiracy, said defendants and each of them represented to all of the stockholders of Anglo Trust Co., including plaintiff, that the regularly published balance sheet of Anglo London Bank was a true condition statement executed and published in compliance with . . . 12 U. S. Code, Secs. 161 and 324." (R. 31.)

Petitioner relied thereon,

> "Plaintiff acted in reliance upon the belief that the balance sheet of Anglo London Bank as published before said consolidation was a true statement . . . The damages which he sustained . . . are the direct consequence of the publication of an untrue condition report . . ." (R. 33.)

Federal Jurisdiction over Third Count.

This Court has sustained jurisdiction over such cases. We cite: *Chesbrough v. Woodworth,* 244 US 72 at 78. There has been no qualification of that rule. It is entitled to recognition as a precedent. Petitioner Denicke applies for a writ in order to obtain a judgment in accordance therewith.

Misconduct in the Circuit Court.

The Denicke complaint contains three counts. (R. 4, 24, 28.) In prosecuting appeal a statement of points was filed pursuant to CCA rule 19. (R. 102.) *This seeks appellate review with respect to each count.* (R. 103, Item 6.)

The Circuit Court made a perfunctory reference to the second count. (R. 24.) It ignored the First Count. And it ignored the Third Count. The refusal to pass on those counts is deliberate.

Misrepresentation as to Nature of Complaint.

The opinion states,

> ". . . the gist of the complaint *and of each count thereof* was that, through *ignorance of his rights,* appellant sustained damages . . . that having *failed to inform him* of his rights, appellees were liable . . . The Constitution of the United States did not, nor did the laws of the United States, make it appellees' *duty to inform* appellant of his rights . . ." (R. 120.)

That statement is untrue. The first count is based on overt acts in violation of a federal statute (12 USCA 34a). It concerns the same conduct which the Circuit Court refused to review in the *Buck Case.*

The Third Count concerns publication of a false balance sheet in violation of 12 USCA 161, and a claim of jurisdiction based on *Chesbrough v. Woodworth,* 244 US 72 at 78. Those facts are not mentioned. That case is not cited, or applied. The binding force of that ruling was disregarded.

Deliberate Disregard of Pleading.

The opinion states,

> ". . . the statement (in each count of the complaint) that appellees violated Secs. 34a and 93 of Title 12 U.S.C.A., and the statement (in count 3 . . .) that appellees violated Secs. 161, 324 and 501a of Title 12 . . . were statements of legal conclusions . . . *The*

complaint stated no facts warranting the conclusion that appellees violated Secs. 34a, 93, 161, 324 or 501a. We therefore are not required to accept any of the stated conclusions as correct." (R. 121-122.)

That statement is untrue. The quotations at pages 6 to 8 hereof, taken from the Third Count, are positive and direct. Such statement is likewise untrue as applied to the First Count. See Petition in *Buck Case,* page 3 and appendix thereto page 4.

Ignorance of Rights—Relation to Cause of Action.

Denicke pleaded ignorance of rights—and resultant damage. This was essential to show that these violations of statute created a loss. Had he been aware of his rights, no fraud in the contract or in the literature sent out could have resulted in an injury. The suit was for a forfeiture of those rights. That forfeiture was brought about by conduct in violation of a Federal Law.

The Third Count presents a different question. Reliance on the false balance lulled petitioner into a false sense of security. Had he known about the $6,500,000 shrinkage Denicke would have voted against the plan. He would, in ignorance, have done the precise thing required to protect the right of redemption created by 12 USCA 34a.

These facts are distorted in the opinion:

"We therefore are not required to accept any of the stated conclusions as correct. We reject them, all but even if we accepted them, it would avail appellant nothing, for the complainant did not show that the damages claimed to have been sustained resulted from the claimed violations. Instead, the complaint

showed, as stated above, that the damages . . . resulted from appellant's ignorance of his rights." (R. 122.)

Arbitrary Opinion Rendered in Disregard of Judicial Standards.

The Circuit Court of Appeals for the Ninth Circuit was opened and established on June 16, 1891. It adopted the set of uniform rules promulgated in all circuits. It immediately established the practice of disposing of all cases by written opinion. That practice has been followed to make "certain for litigants the disciplined reasoning" of the judges assigned.[3]

By a rule adopted November 30, 1936 such opinions are required to bear signatures and be filed with the clerk. (CCA Rule 3.) Since that date it has been the rule, and therefore the law, in the Ninth Circuit that all decisions be evidenced by a written opinion or by some other writing sufficient to disclose action of the Court.

The opinion filed in the case at bar exhibits a disregard of every standard which ought to govern judicial conduct in the review of a case in that Court.

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[3]Report of Judicial Section—Am. Bar Assn. (Aug. 1942) entitled "Methods of Reaching and Preparing Appellate Court decisions." This describes established procedure in Ninth Circuit:

"Cases decided on the merits are upon written opinion, thus making certain for litigants the disciplined reasoning of its judges." (p. 59.)

"To give a true conference between the bench and counsel in the course of the presentation of the appeal." (p. 60.)

"Thereafter to have, before decision, a conference (and often conferences) in chambers of three fully prepared judges." (p. 61.)

"To assign the case for opinion writing only after reaching a decision based upon such consideration." (p. 61.)

"For the careful study by the other two judges of the final form of the opinion before it is handed down." (p. 62.)

First Standard—Sufficiency of Statement of Facts.

Such statement should be true—and it should be complete. The opinion conceals jurisdictional facts which appear in the first and third counts. The purpose and effect of the pleading is unfairly stated.

Second Standard—Analysis of Statute.

Where a case turns on a statute—the provisions of such statute should be analyzed by the opinion in sufficient detail to exhibit the questions involved. That duty was not performed.

Third Standard—Analysis of Contract.

Where a case involves a contract, its terms should be subjected to analysis to develop the issues, and to answer the contentions of the contending parties. In the case at bar we have an agreement alleged to be in violation of an Act of Congress. Neither the statute nor the contract was subjected to analysis.

Fourth Standard—Obedience and Recognition of Authority.

The Circuit Court has refused to recognize the authority of the following cases:

Chesbrough v. Woodworth, 244 US 72 at 78;

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548 at 569;

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 378.

Fifth Standard—Consideration of Argument.

The opinion should give proper consideration to the arguments and contentions of *both parties.* It should answer those contentions which are recognized as important. There was a flagrant refusal to perform that

duty. We file herewith a motion to correct diminution and for enlargement of record. This discloses the following proceedings on oral argument,

(1) Request of Circuit Judge Healy that we elaborate argument to cover responsibility for false balance sheet under third count.

(2) Similar questions put by the Court to counsel for respondents.

(3) Further reference to that subject on closing argument.

The following statement was made from the bench:

"Judge Healy: . . . *The third count in this case is the one that gives me difficulty. I will confess that. I do not know about my associates. Neither of you has satisfied me that it does or does not state a cause of action that is cognizable by a Federal Court.*"[4]

In the face of that statement, an opinion was signed and filed which does not refer to any essential fact contained in that count!

Sixth Standard—Discussion of Authority.

The following cases were in point:

Chesbrough v. Woodworth, 244 US 72 at 78;

Wyman v. Wallace, 201 US 230;

Jones National Bank v. Yates, 240 US 541;

Texas & Pacific Ry. Co. v. Rigsby, 241 US 33;

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548;

Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501;

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 378;

California Bank v. Kennedy, 167 US 362;

[4]See affidavit with motion for enlargement of record.

Siler v. Louisville & Nashville RR Co., 213 US 175;
The Fair v. Kohler Die Co., 228 US 22;
Chicago Life Ins. Co. v. Needles, 113 US 574.

The Circuit Court opinion does not cite, or follow, or distinguish, or discuss any of those rulings. Its decision exhibits a total disregard of precedent.

Seventh Standard—Duty to Decide Entire Case.

Practically everything in this case has been disregarded. The Circuit Court ignored the first count and it ignored the third count. The legal effect of both counts has been misstated. The Court violated the principle laid down by Chief Justice Marshall in *Cohens v. Virginia*, 19 US (6 Wheat.) 264 at 403.

> "The judiciary cannot, as the legislature may, avoid a measure . . . With whatever doubts . . . a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

Eighth Standard—Duty to Render an Opinion Containing Reference to Everything Decided.

The opinion should decide everything—everything decided should be in the opinion.

If we are incorrect in our assumption that the Court evaded its responsibility—if we are in error in stating that it refused to pass judgment on the first and third counts of our pleading—then something even more serious has occurred.

A decision has been rendered on all points—*but a part of that decision has been made public and a part of it has been held in secret.*

A part of that decision has been subjected to the scrutiny which attaches to a public pronouncement evidenced by a public document.

The rest of that decision has been concealed—it is a secret not incorporated in any document. That part of the decision is immune from criticism because it cannot be reviewed or examined.

If the Circuit Court of Appeals has refused to determine the questions presented in the First and Third Counts, a writ should issue because of violation of the principle laid down in *Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403.

If that Court has in fact decided those questions and rendered a decision which conceals its actual conclusions and deliberations, then we should have the benefit of a ruling in this Court, where a proper opinion may be rendered.

Immediate Application for Certiorari.

There was a condition in the Circuit Court preventing relief by application for reassignment or by petition for rehearing in bank. The Court had a membership of six. Consent of the judges now assigned was necessary to effect a change. All joined in the opinion which discloses refusal to exercise jurisdiction. These facts are presented in detail at pages 11 to 13 of the petition filed in the *Buck* case. There was no course to pursue other than by an application for direct relief on certiorari.

JURISDICTION.

This Court has jurisdiction under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 USCA 347.)

The Circuit Court had jurisdiction under Section 128 of said Code. (28 USCA 225.) The District Court had original jurisdiction under Section 24 thereof. (28 USCA 41.)

Judgment was entered in the Circuit Court on April 27, 1944. (R. 123.) Petition is filed within three months of that date.

PETITIONER'S EXHIBITS.

The following are presented herewith:

1. Schedule of documents used in effecting consolidation. (Appendix p. 19.)

2. Federal statute concerning publication of condition statements. (Appendix p. 20.)

3. Analysis of questions in pleadings concerning the merits. (Appendix p. 21.)

QUESTIONS PRESENTED.

1. Right to a writ to secure appellate review of case.

2. Right to a writ to obtain compliance with decisions of this Court cited at pages 4 and 5 hereof.

3. Right to an adequate opinion in the Circuit Court.

4. Right to a writ to obtain relief from the unfair and unjudicial conduct disclosed by the opinion filed in the Circuit Court.

5. Right to an opinion disclosing the actual decision of the Circuit Court upon each substantial question, with an adequate statement of reasons relied upon to support such conclusions.

6. Right to reversal and issuance of a mandate requiring District Court to retain jurisdiction—such jurisdiction being established by the following,

(a) Cause of action created by federal statute. (12 USCA Secs. 34a, 93, 161, 324 and 501a.)

(b) Violation of duty created by such federal laws, appearing as an essential ingredient of the case.

(c) Need for construction and interpretation of said federal laws in order to pronouice judgment.

REASONS FOR GRANTING THE WRIT.

1. To prescribe the standards which should govern the writing of opinions and the rendering of decisions in the Circuit Courts.

2. To present continuance of the abuses disclosed by the record herein. The Circuit Courts are now Courts of last resort in ninety-five percent of all cases. Administration of justice will break down in the Federal Courts unless measures are taken to compel observance of the conduct which should apply to appellate review. Petitioner is entitled to relief from the condition disclosed.

3. To enforce compliance with decisions of this Court.

4. To relieve petitioner from the arbitrary and unjudicial conduct disclosed by the record herein.

5. Total lack of standards in lower Courts. Jurisdiction failed in the District Court. The Circuit Court refused to correct that error. It used a dangerous technique to accomplish that result—concealment of material facts from the opinion. There has either been a refusal to act in a case where the Court was bound to act—or there has been a secret determination on some matters not disclosed in the opinion, and a public pronouncement as to the others. The integrity of the judicial process is affected by this condition.

Under Section 240 of the Judicial Code, we apply for issuance of a writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for writ of certiorari is well founded, and that the same is not interposed for purposes of delay.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT.

(Appendix Follows.)